APPEAL NO. 010412

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on January 30, 2001, the hearing officer resolved the sole disputed issue by concluding that the appellant (claimant) was intoxicated at the time of his injury on _____. The claimant has appealed this conclusion and two factual findings for evidentiary insufficiency. The respondent (carrier) urges in reply that the evidence is sufficient to support the challenged findings.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant was intoxicated at the time of his injury on _____. A coworker of the claimant's, Mr. N, testified that on that date at 6:30 a.m., he met the claimant at a business site where they got into a company truck and the claimant drove them to another location where they were given their assignment for the day, namely, to drive to still another location and perform sandblasting and painting work; that the claimant drove the truck, which was pulling an air compressor, to a gas station and refueled; and that they then changed drivers and the claimant, who said he had "partied last night" and was pretty tired, went to sleep. The evidence reflects that Mr. N later drove off the highway on the way to the work site and that the claimant, who was not wearing a seat belt, was ejected and remains in a coma. Mr. N testified that the claimant did not appear to have any problems with driving or with purchasing gasoline and, later on, a burrito and coca cola, but that he did look tired.

The carrier introduced a confirmatory drug test report dated June 29, 2000, reflecting the presence of the cocaine metabolite in the amount of 7500 milligrams per milliliter in the claimant's urine. Dr. K, an internal medicine specialist, reported to the carrier on July 10, 2000, that based on this drug test result, greater than 7500 ng/ml in the claimant's body, the claimant would be considered to be in a state of intoxication at the time of the injury and that this is consistent with the definition of intoxication in Section 401.013.

Intoxication, if proven, is an exception to the liability of the carrier. Section 406.032(1)(A). Intoxication is defined as not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of an alcoholic beverage, a controlled substance, or a controlled substance analogue. Section 401.013(a)(2)(B). The claimant maintains that the testimony of Mr. N stands unrefuted and compels a finding that the claimant was not intoxicated. However, whether a claimant was intoxicated at the time of an injury is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950266, decided March 31, 1995. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), including the testimony of Mr. N, and the report of Dr. K. As the trier of fact, the hearing

officer resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey , 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). We are satisfied that the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge